UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CHRISTOPHER PEMENTAL, Plaintiff v. THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES FHAMA 2004-AA5, ALIAS, NATIONSTAR MORTGAGE, LLC, JOHN DOE, ALIAS, Defendants	C.A. No. 16-483-S-PAS

MEMORANDUM OF REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Now come Defendants The Bank Of New York Mellon F/K/A The Bank of New York, as Trustee for the Holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMA 2004-AA5(the "Trust") and Nationstar Mortgage, LLC ("Nationstar," collectively the "Defendants") and submit the following memorandum in reply to Plaintiff Christopher Pemental's ("Plaintiff") Opposition to Defendants' Motion to Dismiss Amended Complaint.

I. PLAINTIFF'S CONTRACT CLAIM SHOULD BE DISMISSED AS MOOT

A. This Court Is Justified In Taking Into Account the Mortgage, Note, Notice of Default, And Mortgage Notices

Plaintiff has claimed that the Defendants have acted inappropriately by attaching to their Motion to Dismiss copies of the Note and Mortgage at issue and the Notice of Default sent to the Plaintiff on November 8, 2013,[1] and that this Court should not take those documents into account. However, the First Circuit has held that when "a complaint's factual allegations are expressly linked to . . . a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *See Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998). In *Beddall*, the First Circuit reviewed a trial court's dismissal of a case against the trustee of a retirement plan created for pilots of Eastern Airlines, claiming a breach of the fiduciary provisions in ERISA on the part of the trustee for failure to properly value the assets held in trust—real estate holdings whose value was inflated by erroneous appraisals. *See id.* at 15-16. The agreement between the trustee bank and the pilots' union explicitly absolved the bank of fiduciary responsibilities such as the duty to carefully police the valuations of the assets held in trust. *See id.* at 16. The plaintiffs in that case did not append the agreement to their complaint, leaving the defendants to do so in a Rule 12(b)(6) motion to dismiss, and the trial court ultimately granted that dismissal, concluding that the agreement—supplied in its entirety by the defendants—controlled. *See id.*

Like in *Beddall*, the Plaintiff's allegations are tied to and dependent upon the Note and Mortgage, the alleged non-existence of a Notice of Default, and the existence and content of certain periodic mortgage notices which Defendants have since located and which are attached *infra*. *See* Plaintiff's Amended Complaint (hereinafter the "Complaint") ECF No. 1-2 at ¶¶ 10 (quoting mortgage); 23-24 ("Plaintiff never received any a [sic] default letter," and "Due to this failure to comply with the terms of the mortgage, no entity was contractually authorized to

[1] To avoid repetitive filings, this Reply Memorandum will not re-attach the exhibits attached to Defendants' Motion to Dismiss. For brevity, this Reply Memorandum will maintain all previous exhibit designations. Thus, the Note remains **Exhibit A**, the Mortgage **Exhibit B**, the Notice of Default **Exhibit C**. Additional exhibits attached to this Reply will continue this sequence.

exercise the statutory power of sale . . . This action constituted a breach of contract . . ."); 43 ("None of these [monthly mortgage] statements have been sent to the Plaintiff . . ."), 55 ("Each of these periodic monthly statements sent to the Plaintiff referenced amount [sic] due to the owner of the mortgage note which contained legal fees and costs and expenses improperly charged to the Plaintiff's mortgage loan."). In other words, for three of the Plaintiff's four counts, liability is dependent on these documents and on whether or not Nationstar and the Trust either followed the letter of those documents, or created and distributed those documents appropriately. Moreover, Plaintiff has not put the authenticity of any documents attached into question. *See* Plaintiff's Opposition to Motion to Dismiss (hereinafter the "Opposition"), p. 10 (objecting that attached Notice of Default may or may not have been sent on correct date, but not otherwise questioning the Notice's authenticity). As a result, it is necessary and appropriate for this Court to examine the documents in their entirely to determine Defendants' liability. *See Beddall*, 137 F.3d at 17.

B. Any Contract Claim Held By Plaintiff Is Moot As The Foreclosure Has Been Withdrawn And Would Have To Be Restarted

Plaintiff goes on to claim that the Notice of Default is deficient and he claims damages in the form of attorneys' fees on account of this alleged deficiency *See* Opposition at p. 13. However, because no foreclosure is currently pending and Defendants would be required to re-notice any new foreclosure, any claim Plaintiff has regarding the impropriety of the previous notices is moot. *See Redfern v. Napolitano*, 727 F.3d 77, 83-85 (1st Cir. 2013); *Barr v. Galvin*, 626 F.3d 99, 104-05 (1st Cir. 2010); *Operation Clean Gov't v. R.I. Ethics Comm.*, 315 F.Supp.2d 187, 193-94 (D.R.I. 2004).

1. *Plaintiff's Claim For Breach Of Contract Is Moot Because No Foreclosure Is Currently Pending*

Federal courts are limited in their jurisdiction to "those claims that involve actual 'cases' or 'controversies,'" and thus "lack constitutional authority to decide moot questions;' the fact that a live controversy existed when the plaintiff brought suit is not enough." *Redfern*, 727 F.3d at 83 (quoting U.S. Const. art. III, § 2, cl. 1; *Barr*, 626 F.3d at 104). As a result, even if a plaintiff brought suit when a live controversy existed, if changing circumstances resolve that controversy, "dismissal of the action is compulsory." *See id.* at 84 (dismissing suit against Department of Homeland Security alleging that the Transportation Security Administration's use of airport body scanners was unconstitutionally violative of their privacy rights as moot where the Department had ceased to use scanners which produced images of air passengers' bodies) (quoting *Maher v. Hyde*, 272 F.3d 83, 86 (1st Cir. 2001); *Operation Clean Govt.*, 315 F.Supp.2d at 193-94 (dismissing particular counts in suit against R.I. Ethics Commission by private watchdog group over attempt to seek sanctions against group for allegedly filing frivolous complaints where complainants withdrew complaints "with prejudice" and Commission entered into a consent order stipulating that the matter was closed, thus ensuring private watchdog group could not be prosecuted or fined on account of those allegedly frivolous complaints).

In this case, no foreclosure is pending at this time as acknowledged by Plaintiff. *See* Complaint (ECF No. 1-2) at ¶ 15. Thus, even if Defendants were to seek to foreclose on the Property, Defendants would have to restart the foreclosure process, starting with the sending of a new foreclosure notice as required by § 34-27-4(b). In other words, if the Defendants sought to reinitiate foreclosure proceedings using the Notice of Default in question, then a case or controversy could result. However, without a current foreclosure pending, there is no issue for this Court to decide with regards to the foreclosure process or the adequacy of the documents in question, until and unless Defendants restart the foreclosure process. *See Redfern*, 727 F.3d at 83; *see also Bangs v. Quality Loan Servs. Corp. of Wash.*, No. 6:12–cv–1543–AA, 2013 WL

867525, at *1-2 (D. Ore. Mar. 8 2013) (finding that where defendant rescinded notice of default making it impossible for defendant to foreclose based on allegedly defective notice, plaintiff's claims became moot). Thus, no live case or controversy continues to exist with regards to the contents of the Notice of Default, and any remaining questions of breach of contract raised by Plaintiff are moot.[2] *See Redfern*, 727 F.3d at 83; *Barr*, 626 F.3d at 104; *Operation Clean Govt.*, 315 F.Supp.2d at 193-94.

2. *No Exception To Mootness Applies*

Moreover, Plaintiff could not avail himself of any exception to the mootness doctrine, because, as noted above, Defendants are not currently relying on the notices already sent to foreclose. *See Am. Civ. Liberties Union of Mass. v. U.S. Conference of Catholic Bishops* (hereinafter *ACLUM*), 705 F.3d 44, 54-55 (1st Cir. 2013); *Redfern*, 727 F.3d at 84-85.

The first general exception to mootness is the so-called "capable of repetition, yet evading review" exception, which requires the party seeking to avail themselves of the exception to show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action again." *Redfern*, 727 F.3d at 84 (quoting *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007)). However, this exception does not apply because even assuming *arguendo* that a new foreclosure would be so short as to prevent full litigation, and assuming *arguendo* that the Notice of Default is defective, there is no basis to assume that new foreclosure notices will be similarly defective, and thus Plaintiff will be unable to show a reasonable expectation of being subject to another defective notice. *See id.* (holding that, where the Department of Homeland Security had retired certain potentially unconstitutionally obtrusive body scanners, plaintiffs' threadbare assertion that they would be exposed to those scanners again did not suffice to prevent the case from being rendered moot by the retirement of the scanners).

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[2] This is particularly true where, as noted in Defendant's Memorandum in Support of this Motion, Plaintiff's only alleged damages are attorneys' fees.

The second exception, the voluntary cessation exception, similarly does not apply, as in this case the cancellation of the foreclosure sale means it is impossible for a sale to take place based on these notices. *See Carlson v. United Academics-AAUP/AFT/APEA AFL-CIO*, 265 F.3d 778, 786-87 (9th Cir. 2001). This exception reflects the rule that "voluntary cessation of challenged conduct moots a case ... only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Carlson*, 778 F.3d at 786. In this case, the challenged conduct is a foreclosure based on an allegedly defective notice. However, because the foreclosure was cancelled and will have to be restarted by the mailing of new notices, it would be impossible for Defendants to foreclose based on this notice, even Defendants wanted to. In this way, this case is similar to *Bangs v. Quality Loan Services Corp. of Washington*, a case involving an allegedly defective notice of default which was subsequently rescinded, canceling the foreclosure sale entirely and thus requiring re-noticing of the foreclosure. *See Bangs*, 2013 WL 867525, at *1-2. Because the allegedly defective notices had was rescinded, making the foreclosure the plaintiff ultimately hoped to avoid impossible, the court in that case granted a motion to dismiss the action as moot. *See id.* Like in that case, in this case Defendants have rescinded the Notice of Default and canceled the foreclosure, which would now have to be restarted. *See id.* Therefore, like in *Bangs*, in this case the Court can be certain that it is absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur. *See id.*

II. THIS COURT SHOULD DIMISS PLAINTIFF'S CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AS MISSTATED AND AN IMPROPER ATTEMPT TO RELITIGATE R.I. GEN. LAWS § 34-27-3.2

A. Plaintiff Relies On Improperly Stated "Extreme" Duty Of Good Faith

Plaintiff signals to the Court his knowledge of the covenant of good faith and fair dealing which is part of all contracts under Rhode Island law. *See* Opposition at p. 16; *see also* *T.G. Plastics Trading Co. Inc. v. Toray Plastics (America), Inc.*, 958 F.Supp.2d 315, 327 (D.R.I. 2013). However, it is evident from the Opposition that he does not rely on this general duty of good faith, but rather on an "extreme" duty of good faith expressed in two Rhode Island cases.[3] *See* Opposition at pp. 16-19. That said, a reading of the cases presented by Plaintiff shows that they cannot serve to create such "extreme" duty.

Three of the cases are about a narrow equitable exception to the general rule that foreclosure sales cannot be unwound solely for lack of consideration. *See Anderson v. Anderson*, 266 A.2d 56, 59-61 (R.I. 1970); *McKenney v. Burney*, 143 A. 778, 779 (R.I. 1928); *Rosenfeld v. Wunsch*, 119 A. 658, 659-61(R.I. 1923). In all three cases, where debtors were unrepresented at foreclosure sales due to excusable neglect—in *McKenney* the declared insanity of the debtor, and in *Anderson* and *Rosenfeld* excusable mistakes on the part of the debtors' attorneys—and where the properties were sold for prices significantly below market price, courts were willing to set aside foreclosure sales and create an equitable post-sale right of redemption. *See Anderson*, 266 A.2d at 60-61; *McKenney*, 143 A. at 779; *Rosenfeld*, 119 A. at 660-61. These cases are thus irrelevant to Plaintiff's case: they do not turn on rights or duties of the mortgagee, and do not announce or rely upon any real or purported trust created by a mortgage or a foreclosure. *See*

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[3] While several other cases are cited by Plaintiff as examples of a violations of the duty of "extreme" good faith, tellingly no other case expressed the duty on the mortgagee in terms of "good faith," extreme or otherwise. *See e.g.* *Anderson v. Anderson*, 266 A.2d 56, 59-61 (R.I. 1970); *Rosenfeld v. Wunsch*, 119 A. 658, 659-61(R.I. 1923); *Manville Covering Co. v. Babcock*, 68 A.421, 422-24 (R.I. 1907). The significance of this distinction will be argued further *infra*.

Anderson, 266 A.2d at 60-61; *McKenney*, 143 A. at 779; *Rosenfeld*, 119 A. at 660-61.

Of the remaining cases cited by Plaintiff, Perhaps *Kebabian v. Shinkle* comes closest to serving his goal. *See Kebabian v. Shinkle*, 59 A. 743, 744 (R.I. 1904). *Kebabian* involved a foreclosure sale where the sale was made after seven continuances, and which sale was allegedly made to an agent of the mortgagee after the mortgagee allegedly dissuaded at least two people from attending or bidding at the sale. *See id.* at 743. In that case, the court held that the plaintiff's allegations of bad faith in conducting the sale were potentially actionable, and declined a demurrer as against those allegations. *See id.* at 744. And, admittedly, the court in *Kebabian* did say that "[s]uch acts are (as we said in *Fenley v. Cassidy*, *supra*) violations of that extreme good faith which is required by the trust relation of mortgagee to mortgagor under a power of sale." *See id.* (italics added). However, the violations the mortgagor alleged in *Kebabian* were not mere technical violations, but rather constituted significant violations of the mortgagee's right to a commercially reasonable sale, far more than the alleged violation identified by Plaintiff. *See id.*

Moreover, the court in *Fenley* did not actually create any particular additional duty between mortgagee and mortgagor. *See Fenley v. Cassidy*, 43 A. 296, 297 (R.I. 1899). *Fenley* involved a note which called for the debt to be due six months after demand. *See id.* at 296. However, the mortgagee in that case foreclosed on the property under dubious circumstances, having sent multiple demand letters, none of which particularly appeared to trigger the six months, and continued accepting interest payments over the six-month period between what the mortgagee considered to be the demand and the sale. *See id.* Indeed, the mortgagee's demand letters subsequent to the one which purported to start the clock offered payoffs which, to the mortgagor and the court, made it seem as though nothing were the matter and no default had taken place. *See id.* at 297. As a result, the court set aside the sale for having failed to comply with the conditions of the power of sale. *See id.* In doing so, the court did not evaluate or describe, even in dicta, what "that extreme good faith" it referred to was, and given the circumstances it stands to reason that "extreme good faith" was the way courts then referred to what we today may call "strict compliance with notice requirements." *Compare Martins v. Fed. Hous. Fin. Agency*, No. 15-235-M-LDA, 2016 WL 5921770, at *1, *4 (D.R.I. Oct. 11, 2016) (granting summary judgment to mortgagor where mortgagee failed to strictly comply with notice requirements by failing to include in notices of default a precise cure date or sufficient notice of the right to reinstate, referring to the requirement of "strict compliance with the notice requirements") *with Fenley*, 43 A. at 297 (setting aside foreclosure sale where mortgagee failed to send appropriate notice of default, referring to "that extreme good faith which is required by the trust relation subsisting between the parties); *and Manville Covering Co. v. Babcock*, 68 A.421, 422-24 (R.I. 1907) (setting aside foreclosure sale where note and mortgage called for default if interest not paid within ten days after it came due and mortgagee began sale procedures two days after interest was due, stating that "To proceed to a foreclosure by sale in violation of the power of sale, is to commit a breach of the trust therein reposed . . .").

Perhaps most importantly, Rhode Island courts have conclusively held that, whatever the nature of the relationship between mortgagee and mortgagor at the time the mortgagee exercises the power of sale, the nature of that relationship cannot be used to sustain an otherwise lost cause of action. *See Reynolds v. Hennessy*, 2 A. 701, 703 (R.I. 1886). *Reynolds* involved a father seeking to recover a property owned by his late son, which was mortgaged and which was acquired by another through fraud. *See id.* at 701. While the father sought to recover the property from its fraudulent owner, the mortgagee sold the property to the fraudulent owner for enough to generate a surplus. *See id.* The case, brought after the statute of limitations had run, was an action for that surplus. *See id.* The father attempted to plead that, besides the action at law based in the contract, the mortgagee-mortgagor relation also created a trust, against which the statute had not lapsed. *See id.* at 702. However, the Rhode Island Supreme Court held that, even if there was a *quasi* trust relationship between mortgagee and mortgagor as to the surplus from a foreclosure sale, there could not be an ancillary equitable action for violations of that trust when an action at law existed. *See id.* at 703 ("If there was a court of chancery, *indebitatus assumpsit* for money had and received would lie.") (quoting *Stoever v. Stoever*, 9 Serg. & R. 434, 454 (Pa. 1823)). Thus, even if Plaintiff is correct that there is an "extreme duty of good faith" which goes above and beyond even strict compliance with the loan documents and the law, that duty does not give rise to a cause of action, nor can it revitalize an otherwise lost cause of action. *See Reynolds*, 2 A. at 703.

B. Plaintiff's Underlying Claim For Violation Of R.I. Gen. Laws § 34-27-3.2 Has Been Rendered Moot

The ultimate purpose of Plaintiff's gambit in seeking to establish and apply an "extreme duty of good faith" is to preserve Plaintiff's original claim for violation of the requirement to send mediation notices under R.I. Gen. Laws § 34-27-3.2. *See Opposition* at 6-7; *see also* Plaintiff's Original Complaint, ECF 4 pp. 166-169. However, because no foreclosure is currently pending and Plaintiff's mortgage is now decidedly exempt from the requirements of § 34-27-3.2, any claim held by Plaintiff on account of § 34-27-3.2 is now moot.[4] *See Redfern*, 727 F.3d at 83-85; *Barr*, 626 F.3d at 104-05; *Operation Clean Gov't*, 315 F.Supp.2d at 193-94.

[4] This fault is in addition to the grounds already addressed in the original Memorandum in Support of Defendants' Motion to Dismiss, ECF No. 2-1, pp. 6-9.

1. *Plaintiff's Claims Under R.I. Gen. Laws § 34-27-3.2 Are Moot As R.I. Gen. Laws § 34-27-3.2 Has Changed And No Foreclosure Is Currently Pending*

As already discussed *supra*, federal courts are limited in their jurisdiction to "those claims that involve actual 'cases' or 'controversies,'" and thus "lack constitutional authority to decide moot questions;' the fact that a live controversy existed when the plaintiff brought suit is not enough." *Redfern*, 727 F.3d at 83. And, as already discussed *supra*, in this case Defendants have canceled the foreclosure at issue, and any new foreclosure would have to be re-noticed in accordance with R.I. Gen. Laws § 34-27-4(b). Thus, the only issue Plaintiff can raise in this case with regards to a requirement for mediation notices is whether § 34-27-3.2 would apply when the Defendants restart that foreclosure. It is axiomatic that it does not.

The Rhode Island General Assembly's immediate action to re-exempt loans in default as of May 16, 2013 has rendered Plaintiff's challenge entirely moot. *See Redfern*, 727 F.3d at 83; *Barr*, 626 F.3d at 104; *Operation Clean Govt.*, 315 F.Supp.2d at 193-94. Effective as of July 2, 2015, any foreclosure where the underlying loan has a default date on or before May 16, 2013 is exempt from the requirements of § 34-27-3.2. *See* R.I. Gen. Laws § 34-27-3.2(o)(2). There can be no dispute that this loan falls into that category of exempt loans, which in turn means that Plaintiff is not entitled to a mediation notice. *See* R.I. Gen. Laws § 34-27-3.2(o)(2). Like in *Redfern*, a subsequent change in the law has worked to moot Plaintiff's claims—even if this Court were to issue an injunction requiring the Defendants to comply with § 34-27-3.2, that would result in no change to Plaintiff's rights. *See Redfern*, 727 F.3d at 83. Thus, no live case or controversy continues to exist with regards to the requirements of § 34-27-3.2 and their application to the Plaintiff's mortgage and loan, and all remaining questions regarding the application of § 34-27-3.2 raised by Plaintiff are moot. *See Redfern*, 727 F.3d at 83; *Barr*, 626 F.3d at 104; *Operation Clean Govt.*, 315 F.Supp.2d at 193-94.

2. *No Exception To Mootness Applies*

Moreover, as with Plaintiff's contract claims, no exception to mootness applies because in this case Plaintiff's claims were rendered moot by a change in the law, foreclosing the applicability of those exceptions. *See ACLUM*, 705 F.3d at 54-55; *Redfern*, 727 F.3d at 84-85.

As already noted, the first exception to mootness is the "capable of repetition, yet evading review" exception, which requires the party challenging mootness to show that 1) the conduct in question is too short to be fully litigated prior to cessation or expiration, and 2) there is a reasonable expectation that the same complaining party will suffer the same harm again. *See Redfern*, 727 F.3d at 84. However, this exception does not apply because even assuming *arguendo* that a new foreclosure would be so short as to prevent full litigation, where the underlying law has changed there is no reasonable expectation or demonstrable probability that Plaintiff will be subject to a violation of § 34-27-3.2 again in the future. *See id.*

As also already discussed, the voluntary cessation exception applies to limit the application of mootness where the changed circumstance is the defendant's own voluntary cessation of the challenged conduct, limiting a defendant's ability to render any suit moot by promising to cease the conduct unless it is absolutely clear that the allegedly wrongful behavior "could not reasonably be expected to recur." *See Carlson*, 778 F.3d at 786. This exception similarly does not apply, as in this case the amendment to § 34-27-3.2 means that Defendants *cannot* commit the wrong previously alleged. *See* § 34-27-3.2(o); *see also Carlson*, 265 F.3d at 786-87. In this case, the challenged conduct is, ultimately, violation of § 34-27-3.2. However, because in this case Plaintiff's mortgage has been excepted by the Rhode Island General Assembly, it is literally impossible for Defendants to once again violate § 34-27-3.2, as Defendants are plainly and absolutely not required by statute to send a mediation notice to Plaintiff. In this way this case is similar to *Carlson v. United Academics*, a case involving a set of defective notices sent by a union, which were subsequently corrected before the party challenging the union's activities was procedurally able to challenge the notices in question. *See Carlson*, 778 F.3d at 786. Because the problematic notices had already been corrected, the court in that case held that a motion for summary judgment challenging the previous improper notices was rendered moot by the corrected notices. *See id.* Similarly, in this case Defendants have corrected the lacking mediation notice by withdrawing the foreclosure, and developments in the law since then have removed the notice requirement entirely. *See id.* Therefore, like in *Carlson*, in this case the Court can be certain that it is absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur. *See id.*

III. THIS COURT SHOULD DISMISS COUNT III AS TILA DOES NOT REQUIRE NOTICES

Plaintiff attempts to discredit the finding of the U.S. District Court of the Middle District of Florida by pointing out that the defendants[5] in those cases tried to claim that the Truth in Lending Act, 12 U.S.C. § 1601, *et seq.* ("TILA") applied as a defense to FDCPA and FCCPA violations. *See Galle v. Nationstar Mortgage, LLC*, No: 2:16-cv-00407-FtM-38CM, 2016 WL 4063274, at *1, *4 (M.D. Fla. June 29, 2016); *Roth v. Nationstar Mortgage, LLC*, No: 2:15-cv-783-FtM-29MRM, 2016 WL 3570991, at *1, *7 (M.D. Fla. June 1, 2016). In both cases the defendant effectively wanted to claim that erroneous notices were sent because they were *required* to be sent by TILA; therefore, the plaintiffs' claims, claiming in part that certain notices should not have been sent where a bankruptcy had discharged the debt, would be void as the mortgagee would otherwise be put in an impossible bind—to either send information notices in violation of the FDCPA, or not send those notices in violation of TILA. *See Roth*, 2016 WL 3570991, at *7; *Galle*, 2016 WL 4063274, at *4. However, the argument that because in those

[5] Coincidentally the same defendant in both cases, and a co-defendant in this case.

cases the defendants sought to plead that TILA applied the courts' findings are somehow not apposite is fallacious. *See Roth*, 2016 WL 3570991, at *7; *Galle*, 2016 WL 4063274, at *4.

Moreover, the Official Interpretation of 12 C.F.R. § 1026.41 (the specific regulation governing periodic mortgage statements) is clear that "[t]he periodic statement is not required for any portion of the mortgage debt that is discharged under applicable provisions of the U.S. Bankruptcy Code." 12 C.F.R. § 1026 Supp. I. (found under section discussing § 1012.41(e)(5)). In this case, the Plaintiff's debt to the Defendants was discharged in its entirety in the previous bankruptcy proceeding. Thus, under TILA, these statements are not required. *See Roth*, 2016 WL 3570991, at *7; *Galle*, 2016 WL 4063274, at *4; 12 C.F.R. § 1026 Supp. I.

IV. THIS COURT SHOULD DISMISS THE FDCPA CLAIM WITHOUT LEAVE TO AMEND AS ANY AMENDMENT WOULD BE FUTILE

Plaintiff proposes to amend his claims under Count IV in order to make concrete the allegations he now tacitly acknowledges were only alluded to in his Amended Complaint.[6] *See* Opposition at p. 27-28 ("The Plaintiff is requesting that the Court allow him to file an amended complaint which will specify the portion of each statement which falsely asserts the amount of the debt due . . . ."). However, during the pendency of the Plaintiff's Opposition, Defendants were able to obtain copies of the mortgage notices Plaintiff did not originally include, showing that any amendment made by the Plaintiff would be futile. *See Morgan v. Town of Lexington*, 823 F.3d 737, 742, 744-46 (1st Cir. 2016); *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 144-45 (1st Cir. 2016); *HSBC Realty Credit Corp. (USA) v. O'Neill*, 745 F.3d 564, 578 (1st Cir. 2014).

As a general rule, courts are not required to allow amendments where those amendments would be futile—that is to say, where "the pined-for amendment does not plead

[6] Plaintiff also proposes to amend his claims under Count III, for similar reasons.

enough to make out a plausible claim for relief." *See O'Neill*, 745 F.3d at 578. In this case, Plaintiff claims that he will be able to make out claims under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA") if he is given leave to amend to specify the improper charges he alleges have been filed. Plaintiff so far has specifically offered two categories of charges he claim are erroneous: attorney's fees and monthly inspection fees. *See* Opposition at p. 28. That attorneys' fees were not improperly charged and that the Plaintiff's theory for claiming that they were improperly charged is dubious at best has been discussed at length in the Defendants' original memorandum, and Defendants would rest on those arguments.

As noted above, while Plaintiff's Opposition was pending Defendants were able to obtain copies of the periodic mortgage notices at issue. In this case, Plaintiff filed his Complaint on August 26, 2016, meaning that, especially where the Plaintiff has indicated he does not seek to relate his claims back to his Original Complaint, the earliest possible violation which could be within the statute of limitations would have had to take place on August 26, 2015. *See* 15 U.S.C. § 1692k(d) (establishing a one-year statute of limitations on actions for damages under the FDCPA). As a result, the most relevant statements for determining whether legal fees were assessed within the limitations period at all are the statements issued on August 18, 2016 (hereby attached as **Exhibit D**) and September 18, 2015 (hereby attached as **Exhibit E**), which contain charges from around the limitations period. In this case, Page 1 of **Exhibit D** shows that no legal fees were charged at all prior to August 18, 2015—in fact, all legal fees charged until that time were waived on August 18. *See* **Exhibit D**, p. 1. That the fees were waived can be seen both by comparing to the previous and to the next statement. **Exhibit E**, like **Exhibit D**, shows no legal fees in the "Lender Paid Expense Summary" box on page 1. In contrast, the periodic mortgage statement issued on July 20, 2015 (hereby attached as **Exhibit F**) shows at the Lender Paid Expense Summary box a running total of legal fees totaling $8,144.75, though no activity since the last statement. In other words, the last statement even bearing a charge for legal fees is well outside the limitations period. Moreover, since the waiver of the fees, no legal fees have been charged to Plaintiff. Therefore, legal fees cannot be the basis for Plaintiff's alleged FDCPA claim.

Plaintiff has also challenged the Defendants' regular inspection fees. Those fees are permitted under the mortgage, which states that "Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, *property inspection* and valuation fees." *See* **Exhibit B,** p. 8. Even if Plaintiff continues to reside at the property, Defendants have every right and obligation to verify the condition of the property they hold a mortgage over and the continued residence of the Plaintiff, in order to protect the real estate from damage or deterioration. *See Walker v. Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1176 (Cal. App. Ct. 2002) ("Even if an initial inspection reveals that the home continues to be occupied and maintained, a lender has legitimate reasons to re-inspect the property every 30 to 60 days thereafter."). Thus, charges for these inspections are not inappropriate, and their inclusion in periodic monthly mortgage statements cannot be violations of the FDCPA.

Where Plaintiff will be unable to amend his complaint to produce a valid claim, this Court should dismiss his claim without leave to amend. *See Morgan*, 823 F.3d at 742, 744-46 (rejecting proposed amended complaint which would claim violations of Title IX in school which allegedly permitted bullying of student as futile where said bullying was not gender-based); *Najas Realty.*, 821 F.3d at 144-45 (dismissing proposed amendments to complaint as futile where proposed amendments were both still unduly vague and also failed to repair additional problem with complain); *O'Neill*, 745 F.3d at 578 (rejecting proposed amendments to complaint as futile where plaintiff's underlying claim was factually barred by document presented by defendant).

In this case, Plaintiff will be unable to amend his pleadings to get around three facts: 1) all of the charges reflected in the periodic mortgage statements are legitimate charges made for legitimate reasons and are authorized under the loan documents, 2) the attorneys' fees charged to Plaintiff were legitimate at the time they were charged, and 3) even if attorneys' fees charged were illegitimate, which Nationstar denies, no new attorneys' fees were charged after the claims bar date of August 26, 2015. As a result, any version of their FDCPA claim will be unable to withstand a Rule 12(b)(6) motion, and thus allowing any amendment to support this claim would be futile. *See Morgan*, 823 F.3d at 742, 744-46; *Najas Realty.*, 821 F.3d at 144-45; *O'Neill*, 745 F.3d at 578.

V. CONCLUSION

For the reasons set forth above, the Trust and Nationstar respectfully request that this Court grant their Motion to Dismiss the Plaintiff's Amended Complaint.

THE BANK OF NEW YORK MELLON
F/K/A THE BANK OF NEW YORK, AS
TRUSTEE FOR THE HOLDERS OF THE
CERTIFICATES, FIRST HORIZON
MORTGAGE PASS-THROUGH
CERTIFICATES SERIES FHAMA 2004-
AA5, and NATIONSTAR MORTGAGE, LLC

By Their Attorneys,

PARTRIDGE SNOW & HAHN LLP

/s/ Santiago H. Posas (#9519)

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DATED: December 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 19, 2016.

/s/ Santiago H. Posas

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